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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

FLORENCE KRAFT, and PHYLLIS BERLIANT,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. In a transferee federal tax collection case in which the United States Supreme Court has mandated that state law shall govern, did the Seventh Circuit have the power to create a new creditors' right contrary to state law permitting the Internal Revenue Service as well as general creditors who were not guilty of laches to collect their claims from distributees of a fully probated estate without such creditors having to file their claims in the probate proceeding?

2. In a transferee federal tax collection case where the United States Supreme Court has held that collection depended upon property classification under state law, did the Seventh Circuit violate that holding

by ignoring the fact that the state involved abolished joint tenancy in bank accounts unless established by a written agreement signed by all joint tenants?

PARTIES TO THE PROCEEDING

Only the parties listed in the case caption are parties to this proceeding. One party to the Tax Court case who was the executrix of the estate involved did not appeal to the Seventh Circuit.

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cleansed of creditor's claims, and instead destroys the purpose of that claims procedure creating uncertainty as to the rights of Estate distributees to spend or liquidate estate distributions without substantial rish of creditors of the estate pursuing them causing them great peril, and this affects thousands of people and charities. It also leads to a possible conflict between teo United States Supreme Court decisions.....10

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The petitioners Florence Kraft and Phyllis Berliant respectfully pray that a writ of certiorari issue to review the Judgement and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on

March 5, 1984 and the denial for rehearing entered on April 4, 1984.

OPINION BELOW

The opinion of the Court of Appeals is reported at 729 F.2d 496 and the opinion of the United States Tax Court is reported as T. C. Memo. 1982-148 and is reported in CCH Tax Court Memorandum Decisions, Volume 43, page 859.

JURISDICTION

The judgement of the Court of Appeals was entered on March 5, 1984 and a timely petition for rehearing was denied on April 4, 1984. The jurisdiction of this Court is involked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Ch. 110 1/2 Illinois Revised Statutes, Sec. 18-12, Ch. 76 Illinois Rev. Statutes sec. 2, 31 U.S.C. §191

(1975).These sections of statutes are fully set out at pages 71-73 of the appendix to this petition.

STATEMENT OF THE CASE

This case originated in the United States Tax Court. That court's jurisdiction was based on 26 U.S.C. sections 7442 and 6214. The Tax Court proceeding involved questions of transferee liability for deficiencies in estate tax against the Estate of Rae Berliant ("Rae").

The fact chronology relevant to the issues raised in this Petition are as follows:

1965-Rae dies. She is the mother of Florence Kraft ("Florence") and of the husband of Phyllis Berliant ("Phyllis") the petitioners herein. Another of Rae's daughters, Irene Magill, ("Irene") is the executrix

of Rae's Estate. In 1965 the executrix pays $3,000 to the Internal Revenue Service toward the estate taxes, but she fails to file a federal estate tax return. (Par 36 of 1st Supplemental Stip of Facts).

December 15, 1971-Irene finally files the estate tax return for Rae's estate. (Pet. App. 27)

Early 1972-Phyllis's husband who is Rae's son dies and his estate is opened. (Sup Stip. of Fact par. 28 and 30).

June 30, 1972. Rae's probate estate was finally closed with distributions having been made. (I.R.S. Group Ex. 19). No claims were ever filed in that estate by the Internal Revenue Service.

1974-The Internal Revenue Service sends out notices of transferee liability to Petitioners for deficiencies

in estate tax claimed owed by Rae's estate. Florence is named as a transferee of Rae's probate estate and Phyllis is named as a transferee of her husband's probate estate which was claimed to be a transferee of Rae's probate estate. Phyllis's husband's probate estate is still open and in the process of probate administration.

May, 1976-the probate of Phyllis's husband's estate is closed with distribution having been made. (Sup. Stip. of Facts, par 28 and 30). The Internal Revenue Service never filed any claim in that estate though about two years had passed after it asserted that Phyllis was liable as a transferee of that estate which was a transferee of Rae's probate estate.

In the Tax Court the Internal Revenue Service acknowledged that it had to establish transferee liability

under state law and attempted to do so under fraudulent transfer statutes. The Tax Court noted that theory, but based its decision as to transferee liability against both petitioners on a state statute which gave an executor the power to petition the probate court to regain prematurely distributed assets and also on a theory that the tax claim was like a contingent claim. In the Court of Appeals the Internal Revenue Service abandoned its fraudulent conveyance argument by stating on page 10 of its brief that it was "inapposite" to the appeal and on page 18 of its brief admitted that estate tax claims were not contingent claims. The Seventh Circuit thus did not decide the fraudulent conveyance issue and acknowledged that no contingent claims were involved.

The Seventh Circuit held that the Tax Court was wrong to rely on a state statute under which an executor seeks relief from the probate court because the Tax Court, not the probate court was involved and the Internal Revenue had not sought that remedy in the probate court. The Seventh Circuit then went on to say that the Tax Court had viewed to narrowly equitable principals for creditor relief in confining their application to contingent claims and held that creditor claimants of a probate estate who have not been guilty of laches may pursue assets of the estate into the hands of distributees of the estate where distribution has been made without discharging their debts. Thus the Seventh Circuit on page 10 of their opinion held that creditor claimants generally of a probate estate who were not guilty

of laches could follow the assets distributed from a probate estate into the hands of distributees of that estate for collection regardless of the fact that those creditors had failed to file a claim in the probate estate. Thus that established a transferee liability against petitioners. Illinois has a statute that bars pursuit of claims by creditors who do not file claims in probate estates.

Florence, in addition to receiving property from Rae's probate estate, received monies from certain bank accounts. The bank books for those accounts stated that Rae and Florence were joint tenants and Florence took possession of the funds at Rae's death (p. app. 13). If Rae and Phyllis were joint tenants, in this case the entire amount in the accounts would be taxed in Rae's estate increasing the liability

of transferees. If the accounts involved a tenancy in common, only 1/2 would be subject to estate tax. Illinois abolished joint tenancies as to bank accounts by legislation which caused such accounts to be treated as tenancies in common unless there was a writing signed by the parties establishing that joint tenancy. No such signed writings were presented in evidence in the Tax Court. Nevertheless the Tax Court held that the actions of the parties and the writings on the bank book were sufficient te establish joint tenancy accounts. Thus the estate tax liability was higher and the amount of property deemed Rae's received by Florence was higher for transferee liability.

REASONS FOR GRANTING THE WRIT

1. THE DECISION OF THE SEVENTH CIRCUIT MISCONSTRUES ILLINOIS LAW IN A WAY THAT CONFLICTS WITH ILLINOIS SUPREME COURT DECISIONS. IT CREATES A BROAD EXCEPTION FOR ALL CREDITORS TO THE ORDERLY PROBATE CLAIMS FILING PROCEDURE DESIGNED TO FACILITATE EARLY SETTLEMENT OF ESTATES WITH PROPERTY DISTRIBUTIONS THEREFROM CLEANSED OF CREDITOR'S CLAIMS, AND INSTEAD DESTROYS THE PURPOSE OF THAT CLAIMS PROCEDURE CREATING UNCERTAINTY AS TO THE RIGHTS OF ESTATE DISTRIBUTEES TO SPEND OR LIQUIDATE ESTATE DISTRIBUTIONS WITHOUT SUBSTANTIAL RISK OF CREDITORS OF THE ESTATE PURSUING THEM CAUSING THEM GREAT PERIL, AND THIS AFFECTS THOUSANDS OF PEOPLE AND CHARITIES. IT ALSO LEADS TO A POSSIBLE CONFLICT BETWEEN TWO UNITED STATES SUPREME COURT DECISIONS.

Under the Illinois Probate Act, 110 1/2 Ill. Rev. Stat. 18-12 (appendix p. 71) all claims against a decedant's estate except expenses of administration and surviving spouse's and child's awards must be filed a certain number of months from the issuance of letters. This provision is not a general statute of limitations, but is a specific act adopted for the specific purpose of facilitating the early settlemant of estates, including payment of claims and distribution of estate assets to heirs and legatees free of creditor's claims. The statute does not destroy the cause of action or affect the right to sue upon the claim, but it only alters the right of the claimant to share in the inventoried assets of the estates if the claim is not filed within the specified time. Thus if no claim is timely filed,

a creditor cannot follow inventoried assets to effectuate collection. Normally statutes setting time limits for actions are tolled during periods of disability such as incompetency as a public policy to protect incompetents. However, such a policy does not apply to the probate claims filing time mandate because the public policy of claims filing time limitations in probate estates to facilitate settlement of those estates is deemed to be of such overriding public importance. Pratt v. Baker, 48 Ill. App. 2d 442, 199 N.E. 2d 307. That emphasizes the public policy importance applied to the time limitations of claims filings in probate estates.

As is stated at the beginning of part III on page 7 of the Seventh Circuit opinion, in order for

petitioners to be held liable as transferees of probate assets for unpaid estate tax, there must be a basis under state law or equity principals for imposing transferee liability. Commissioner v. Stern, 357 U.S. 39.

The Seventh Circuit seeks to establish that basis through the case of Union Trust v. Shoemaker, 258 Ill. 564, 101 N.E. 1050 (1913). It seeks to have that case hold that as to probate estates, creditors who have not been guilty of laches may pursue assets into the hands of distributees, where distribution has been made without discharging the creditors debts even though the creditor has failed to file a claim in a probate estate. That case does hold that. The Seventh Circuit also states that this principal is not limited

in that case to contingent claims cases for that limitation would cause that principal not to be applicable to the instant case wherein the Internal Revenue admits there is no contingent claim at issue. However, the Seventh Circuit is wrong in saying that the case applies this principal of following assets to distributees of a probate case to situations other than those involving contingent claims. The Seventh Circuit has taken the language upon which it relies out of context. When one reads that language in the context of pages 570-573 of the decision, one can see that the application involved refers to contingent claims in probate matters. There is no decision regarding probate in Illinois that permits the application of the principal relied on to distributees of a probate estate

except where a contingent claim is involved. The Seventh Circuit on page 9 of its opinion blames that lack of application in later cases on the Illinois courts applying Shoemaker "without performing further independent analysis". The Seventh Circuit cannot prescribe for the state courts of Illinois the type of analysis it desires for those state courts to determine principals of state law. The latter decisions of the Illinois Supreme Court apply Shoemaker only to situations where there is an unripened contingent claim which has no remedy at law. Sanders v. Merchants State Bank, 349 Ill. 547 at 569-570, 182 N.E. 2d 897, Beebe v. Kirkpatrick, 321 Ill. 612 at 617 and 618, 152 N.E. 2d 539. The United States Supreme Court similarly applied Shoemaker in Pufahl v. Estate of Parks,

299 U.S. 217 at 229 and did not find any creditors' right catagory permitting creditors who failed to file their claims in probate to pursue collection against distributees of probate property even if they were not guilty of laches except in situations involving contingent claims. There is no case law regarding probate that permits that wider application. The Seventh Circuit decision is thus in conflict with limitations applied to Shoemaker by the Illinois Supreme Court as to application of state law which is a reason for granting certiorari.

The practical effect of the Seventh Circuit's giving this new catagory of creditors' rights regarding collection due to distribution of assets from probate is all the more reason for granting certiorari. The effect will

otherwise be severe and widespread in Illinois. It is easy not to be guilty of laches in Illinois, all one need plead is lack of knowledge of facts or even of legal requirements. Bremer v. Bremer, 411 Ill. 454 at 465, 104 N.E. 2nd 299, People ex rel Fleming v. Conlisk, 11 Ill. App. 3d 520 at 523-4. Claimants who missed the bar dates for filing claims in probate will come up with all sorts of reasons why laches does not apply to them and an attorney could face malpractice if he did not attempt to force transferees of property from probate to pay claims that were not filed in probate. The solidity established by the probate claim bar date will be gone. People and charities who were distributees of probate estates and who have spent or liquidated what they got will face seizure of their own assets to satisfy claims of persons who

who failed to file claims in probate. A distributee of a probate estate who got property from the estate nine years ago and who thought it was his suddenly can be confronted by a creditor of the decedant under a written contract with a 10 year statute of limitations demanding to be paid. And we are not dealing with rare contingent claims. One probate judge in Chicago has already said that chaos will result from the Seventh Circuit decision.

Illinois courts will most likely at the higher level eventually put an end to such chaos, but in the interim attorneys fees will be incurred, cases may be settled to avoid expensive litigation and distributees may loose and not be able to bond for an appeal. Furthermore, out of state creditors will use diversity jurisdiction in

in the United States District Courts in Illinois to take advantage of such courts being bound by the Seventh Circuit decision and such courts will have the added burden of being post probate collection courts, a burden that our overcrowded district courts do not need.

The Seventh Circuit opinion is written to apply to all creditors. There is a special problem regarding the Internal Revenue Service as a creditor. Under Commissioner v. Stern, 357 U.S. 39 it must pursue transferee collection as to distributees of probate property under state laws imposing transferee liability. Yet under U.S. v. Summerlin, 310 U.S. 414 at 416 the Internal Revenue Service is not supposed to be subject to probate claims bar dates or a defense of laches. The latter nullifies the

Seventh Circuit requirement of showing one is not guilty of laches, but the Stern case appears to cause the opposite result. Granting certiorari could clarify the interrelation of these two United States Supreme Court desisions.

We must also note, that if equity did apply as the Seventh Circuits indicates, its use in this case would be barred by remedies at law as stated in Shoemaker at page 571. The Internal Revenue Service has 31 U.S.C. 191 (1975) and its sucessor statute which imposes liability on executors and administrators for making probate distributions before settlement of taxes. That liability is for the unpaid taxes. In addition, the Internal Revenue has the remedy of filing claims in probate estates. It is ridiculous why it did not do so in the estate of the

husband of Phyllis which did not close until 1976. The Tax Court opinion also states numerous collection options that the Internal Revenue Code gives for collection from nonprobate assets of the decedant. Probate assets were never supposed to be subject to those statutes. The regulatory scheme gave due deference to state probate procedures. That deference is now being destroyed. The Internal Revenue Service had its remedies at law and it should have pursued them. The Seventh Circuit should not have made its unwaranted intrusion on the Illinois probate procedure undermining its solidity.

2. CERTIORARI SHOULD ALSO BE GRANTED BECAUSE THE SEVENTH CIRCUIT IS NOT FOLLOWING ANOTHER DECISION OF THE UNITED STATES SUPREME COURT

Aquilino v. United States, 363 U.S. 509 states that state law controls the determination of the interest that a taxpayer has in property. In Illinois joint tenancies were abolished as to bank accounts by 76 Ill. Rev. Stat. §2 and the Illinois courts have held that to establish joint tenancy as to bank accounts, one must do so by a writing signed by all parties and that conduct or writing titling a bank account does not do so. Doubler v. Doubler, 412 Ill. 597 at 600, 104 N.E. 2d 814, In re Estate of Gubala, 81 Ill. App. 2d 378 at 385, 225 N.E. 2d 646. In part IV of its opinion the Seventh Circuit ignores this and holds that conduct and notations on a bank book can establish joint tenancy. Joint tenancy was either established by the signed agreement or it was not and we have a tennancy in common.

For these reasons, a writ of certiorari should issue to review the judgements and opinions of the Seventh Circuit.

Respectfully submitted,

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